Due service and receipt of a copy of the within is hereby admitted

this_____day of March, 1930.

_____

United States Attorney,

_____

Assistant United States Attorney,
Counsel for Appellee.

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(34,617)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929—No. 486

OCTOBER TERM, 1930—No. 14

WILLIAM A. SHERMAN, M. F. COCHRANE, and J. B. SANFORD, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

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Counsel for Appellants.

EDWARD M. JAFFA,
Crocker First National Bank Building, San Francisco,
Of Counsel.

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SUPPLEMENTAL BRIEF FOR APPELLANTS.

I.

OPINION OF THE COURT BELOW.

This case originally came before this Court on certified questions of law from the Circuit Court of Appeals for the Ninth Circuit, and, therefore, no opinion by the Court below has been rendered or is involved.

II.

JURISDICTION.

Said questions were certified by said United States Circuit Court of Appeals pursuant to Judicial Code Section 329, as amended in 1925. Act of Cong. Feb. 15, 1925, C. 229, Sec. 1, 43 Stat. 938.

The joint motion of both parties hereto for a writ of certiorari to bring up the entire record and cause was granted by this Honorable Court on May 5, 1930. (Tr. 58.)

III.

STATEMENT OF CASE.

A full and complete brief has heretofore been filed in this Honorable Court on behalf of appellants. This brief was filed prior to the making of the motion to bring up the entire record and contains a complete discussion of their argument upon the questions of law certified by the United States Circuit Court of Appeals.

The only issues involved in this appeal are the determination of the basic questions of law so certified. There are no other issues involved, and the determination of the said questions will completely decide the entire appeal.

This action is in the nature of a test case and was submitted upon an agreed written stipulation of facts for the purpose of squarely presenting the essential and vital points involved in the question of what liability, *if any,* rests upon Board of State Harbor

Commissioners of the State of California, either in their official capacity as officers of the State (i. e. liability of the State of California), or in their private capacity as individuals, for violations of the Federal Safety Appliance Act, *occurring without their personal participation, without their knowledge or consent, and contrary to their orders and instructions.*

Appellants joined in making the motion to bring up the entire record solely to enable this Honorable Court to examine the entire agreed stipulation of facts above referred to (Tr. 24 to 40) should it so desire.

We believe that the Court can best consider the questions of law involved in this appeal on the basis of the certificate from the United States Circuit Court of Appeals and the questions therein certified. We believe that any further argument on the merits would involve useless repetition and be merely a burden upon the Court.

We, therefore, respectfully refer the Court to the brief heretofore filed on behalf of appellants for a consideration and discussion of the questions of law involved in this appeal. We will confine this supplemental brief to a succinct discussion of the relation of the answers to said questions to the disposition of the cause and will also set forth the assignments of error relied upon in the appeal.

For the convenience of the Court, we have arranged to amplify the record references in the brief heretofore filed. The printed references under the letter capital "R" refer to the certificate from the United States Circuit Court of Appeals. The additional hand-

writing references designated by capital "Tr." refer to the Transcript of Record subsequently filed pursuant to the granting of the motion to bring up the entire record. Similar designations are used in this brief.

In the certificate of the United States Circuit Court of Appeals, the appellants are referred to as "defendants" and for convenience, they will be hereinafter so referred to.

Briefly, and without attempting to cover or repeat the statement of the case contained in the original brief, the defendants are appointive State officers of the State of California, and constitute the Board of State Harbor Commissioners, and have jurisdiction over the Harbor of San Francisco, California. In connection with the maintenance of this harbor, the State of California owns and operates the State Belt Railroad for the purpose of rendering switching services only. The said railroad is under the general jurisdiction and supervision of said Board of State Harbor Commissioners.

The acts complained of are violations of the provisions of the Federal Safety Appliance Act, occurring upon the said State Belt Railroad but involving cars furnished to said road by various common carriers for switching. The defendants did not personally operate or supervise the operation of the State Belt Railroad, and if any violations of the Federal Safety Appliance Act occurred upon the said railroad, they occurred without the personal knowledge of defendants or any of them and without the consent of

defendants or any of them and contrary to the orders and instructions of defendants. (R. 4, Tr. 28.)

The United States District Court entered judgment for nine hundred ($900.00) dollars against William A. Sherman, M. F. Cochrane and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad. (Tr. 22.)

The defendants urge that they are *not* liable *either* in their official capacity as officers of the State of California, *or* in their private capacity as individuals, for any such violations of the Federal Safety Appliance Act. Their contentions are summarized in detail in the opening of the argument infra.

IV.

SPECIFICATION OF ERRORS RELIED UPON.

The errors committed by the District Court and urged on this appeal are the following:

1. That the said District Court erred in overruling defendants' demurrer and denying defendants' motion to dismiss.

2. That the evidence was and is insufficient to justify the decision and judgment of the said District Court.

3. That the judgment of the District Court is contrary to the evidence.

4. That the District Court erred in rendering and entering judgment against defendants.

5. That the District Court erred in adjudging that the Federal Safety Appliance Act imposes or authorizes the imposition of a fine or penalty upon defendants individually.

6. That the District Court erred in adjudging that defendants, as members of the Board of State Harbor Commissioners, were liable for torts of subordinate officers.

7. That the District Court erred in adjudging that it had jurisdiction over officers of the State of California acting in their official capacity.

8. That the District Court erred in imposing a fine or penalty upon officers of the State of California for acts occurring in the regular performance by them of a governmental function.

9. That the District Court erred in adjudging that the State Belt Railroad is a common carrier engaged in interstate commerce by railroad within the meaning of the Federal Safety Appliance Act.

All of the assignments of error are relied upon. Said assignments more specifically cover some of the errors above named and appear on pages 44 to 48 inclusive of the transcript.

V.

CERTIFIED QUESTIONS OF LAW.

The following questions of law are certified to this Honorable Court by the said United States Circuit Court of Appeals (R. 5, Original Brief, 5):

1. Is the State Belt Railroad a common carrier engaged in interstate commerce within the meaning of the Federal Safety Appliance Act?

2. If No. 1 is answered affirmatively, is the State Belt Railroad (owned and operated by the State of California) subject to the Safety Appliance Act, which by general language imposes duties upon "any common carrier engaged in interstate commerce" but does not expressly refer to a State or other sovereignty? *(Guarantee Company v. Title Guaranty Company,* 224 U. S. 152, 155, et seq.)

3. If this question also is answered in the affirmative, and if the complaint and the judgment be construed as running against the members of the Board of State Harbor Commissioners, in their official capacity, and hence in a sense against the State, did the District Court have jurisdiction of the action?

4. Upon the other hand, if the judgment be deemed to be against the defendants in their private capacity, can it be sustained in view of the considerations:

(a) That the Act imposes penalties only upon the "carrier"; and

(b) That the defendants did not own or personally manage or operate the Belt Line, and the alleged infractions of the law were due to no act or omission upon their part and the wrongdoing was not only without their participation, consent, and knowledge, but was contrary to their orders and instructions?

VI.

ARGUMENT.

The argument in the original brief (page 6) follows the order of the above questions and is summarized as follows:

Summary of Argument.

Point A. That the State Belt Railroad (owned and operated by the State of California) is not a common carrier engaged in interstate commerce within the meaning of the Federal Safety Appliance Act.

Point B. That the State Belt Railroad (owned and operated by the State of California) is not subject to the Federal Safety Appliance Act. The Federal Safety Appliance Act does not expressly refer to a State or other sovereignty and therefore, does not apply thereto. It could not properly so apply because the United States has no right to impose a fine or penalty upon the State of California or upon the officers of the State of California, for acts occurring in the regular performance by them of a Governmental function of said State.

Point C. That if the complaint and judgment be construed as running against the members of the Board of State Harbor Commissioners in their official capacity and hence against the State, then the District Court of the United States did not have jurisdiction of the action.

Point D. That if the judgment be deemed against defendants in their private capacity, then it cannot be sustained, because

(a) The Act imposes a penalty upon the "carrier" only and *not* upon any individual or officer thereof;

(b) Defendants did not own or personally manage or operate the Belt Line; the alleged infractions of law were due to no act or omission upon their part and the wrongdoing was not only without their participation, consent and knowledge but also contrary to their orders and instructions. The defendants cannot be held liable in their private capacity for such infractions of law. The defendants are not personally liable for the torts of their subordinate officers.

INTRODUCTION.

In this portion of this brief we will not repeat any of the argument contained in the original brief, but will confine the discussion to a brief correlation of the determination of the questions presented in the summary of the argument and the questions of law certified by the United States Circuit Court of Appeals, and the effect thereof upon the determination of the case.

POINT "A."

THE STATE BELT RAILROAD (OWNED AND OPERATED BY THE STATE OF CALIFORNIA) IS NOT A COMMON CARRIER ENGAGED IN INTERSTATE COMMERCE.

The Federal Safety Appliance Act relates only to common carriers engaged in interstate commerce.

Unless, therefore, the State Belt Railroad is engaged in interstate commerce within the meaning of

the Federal Safety Appliance Act the plaintiff cannot recover in this action.

If this Honorable Court determines that the said State Belt Railroad (owned and operated by the State of California) is not a common carrier engaged in interstate commerce within the meaning of the Federal Safety Appliance Act, then the first question certified by the United States Circuit Court of Appeals must be answered in the *negative*, and the judgment of the District Court must be *reversed*.

POINT "B."

THE STATE BELT RAILROAD (OWNED AND OPERATED BY THE STATE OF CALIFORNIA) IS NOT SUBJECT TO THE FEDERAL SAFETY APPLIANCE ACT.

This point involves a discussion of the second question of law certified by the United States Circuit Court of Appeals. It raises the points that the Federal Safety Appliance Act, by its terms, does not apply to a State or other sovereignty, and that at least in so far as the penalty provisions thereof are concerned (and those are the ones here under discussion), said Act could not be made legally applicable to a sovereign State, or the officers thereof for acts occurring in the regular performance by them of a governmental function of said State. In other words, the United States has no right to impose a fine or penalty upon the State of California, or any of its officers for performance by them of a governmental function.

Obviously, plaintiff cannot recover unless the Federal Safety Appliance Act is legally applicable to the

State Belt Railroad (owned and operated by the State of California)—unless said railroad, so operated, is subject to said Act.

Therefore, if this Honorable Court agrees with defendants' contentions upon this point and answers the second question of law certified by the United States Circuit Court of Appeals in the *negative*, then the judgment of the District Court must be *reversed*.

POINT "C."

IF THE COMPLAINT AND JUDGMENT BE AGAINST DEFENDANTS IN THEIR OFFICIAL CAPACITY, THEN THE DISTRICT COURT DID NOT HAVE JURISDICTION OF THE ACTION.

If both questions 1 and 2 certified by the United States Circuit Court of Appeals are answered in the affirmative, then, and then only, does it become necessary to consider questions 3 and 4 so certified, and points "C" and "D" of the argument. As above indicated, negative answers to the said first two questions, or either of them, require a reversal of the judgment of the District Court.

Should the said first two questions be answered in the affirmative, it then becomes necessary to determine whether the action be deemed to be one against the Board of State Harbor Commissioners in their official capacity and hence, in a sense, against the State. If this be the nature of the action, then it is defendants' contention that the District Court did not have jurisdiction of the action.

If this Honorable Court agrees with defendants' contention in this particular, and answers the third question of law certified by the United States Circuit Court of Appeals in the *negative,* then the judgment of the District Court must be *reversed.*

POINT "D."

THE JUDGMENT CANNOT BE SUSTAINED IF IT BE DEEMED AGAINST DEFENDANTS IN THEIR PRIVATE CAPACITY.

If the first two certified questions of law be answered in the affirmative, and the judgment be deemed to be not one against the State Harbor Commissioners in their official capacity, but rather against them in their private capacity, then the defendants contend the judgment of the District Court cannot be sustained because:

(a) The Act imposes a penalty upon the carrier only and not upon any individual or officer thereof, and

(b) Defendants do not own or personally manage or operate the Belt Line; the alleged infractions of law were due to no act or omission upon their part and the wrongdoing was not only without their participation, consent or knowledge, but also contrary to their orders and instructions. The defendants cannot be held liable in their private capacity for such infractions of law. They are not liable for the torts of their subordinate officers.

This point is raised last in appellant's brief and the question relating thereto was, we believe, placed

in the fourth position by the United States Circuit Court of Appeals, because it only becomes material if the two first questions are answered in the affirmative and if the action be nevertheless deemed one against defendants in their individual capacity and *not* in their official capacity

To sustain the judgment against defendants in their individual capacity plaintiff must prove; first, a statute assessing or authorizing a penalty against some *individual* and, secondly, that the defendants have *individually* and *personally* rendered themselves liable to such penalty by reason of some act committed or omitted by them *personally* and *individually*.

As above stated, defendants contend that they cannot be held liable in their individual capacity, under the provisions of the Federal Safety Appliance Act, and upon the facts involved in this action. If this Honorable Court agrees with defendants' contention in this particular, then the fourth question of law certified by the United States Circuit Court of Appeals should be answered in the *negative*, and the judgment must be *reversed*.

VII.

CONCLUSION.

Defendants and appellants have shown that the judgment of the United States District Court cannot be sustained upon any theory.

If the State Belt Railroad, owned and operated by the State of California, is not a common carrier en-

gaged in interstate commerce within the meaning of the Federal Safety Appliance Act, the judgment must be reversed.

If the State Belt Railroad (so owned and operated) is such a common carrier, but nevertheless is not subject to the Federal Safety Appliance Act, then the judgment must be reversed.

If the State Belt Railroad is such a common carrier and is subject to said Federal Safety Appliance Act, and the judgment be construed as running against the Board of State Harbor Commissioners in their official capacity and hence against the State, then the judgment must be reversed because the District Court did not have jurisdiction of the action.

If, on the other hand, the State Belt Railroad is such a common carrier and is subject to said Federal Safety Appliance Act, but the judgment be deemed to be against defendants in their private capacity, *then also it must be reversed,* because the Act imposes a penalty upon the *carrier* only, and not upon any individual or officer thereof; and, further, because the defendants did not own or personally manage or operate the Belt Line, and the alleged infractions of law were due to no act or omission on their part and the wrongdoing was not only without their participation, consent and knowledge, but was contrary to their orders and instructions.

In our conclusion to the original brief we summarized the argument and demonstrated that all of the questions of law certified by the Circuit Court of Appeals should be answered in the *negative.* Such

answers *require a reversal* of the judgment of the District Court.

In conclusion then, we respectfully refer this Honorable Court to our original brief heretofore filed herein for a complete argument upon all questions involved in the appeal, and respectfully submit that the questions of law certified to this Honorable Court by the United States Circuit Court of Appeals, for the Ninth Circuit, should *all* be answered in the *negative* and the judgment of the District Court *reversed.*

Dated, San Francisco,
October 6, 1930.

Respectfully submitted,

LEON E. MORRIS,
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EDWARD M. JAFFA,
Of Counsel.